

2230. Gen. S. Parker
U. S. Circuit Judge
Charlotte, N. C.

**APPENDIX TO BRIEF FOR
APPELLANTS**

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FOURTH CIRCUIT

—

No. 5273

—

T. HENDERSON KERR AND LOUISE KERR,
Appellants,

v.

THE ENOCH PRATT FREE LIBRARY OF BALTI-
MORE CITY, a corporation, et al., *Appellees.*

—

**Appeal from the District Court of the United States for the
District of Maryland.**

—

FILED

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**Appeal from the District Court of the United States for the
District of Maryland.**

BRIEF FOR PLAINTIFFS-APPELLANTS.

STATEMENT OF CASE.

Plaintiff-Appellant Louise Kerr, a young Negro citizen of Baltimore City brought suit in the United States District Court, D. Maryland, against the Enoch Pratt Free Library of Baltimore City, a corporation (hereinafter called the Library), the individual Library trustees Cullen, Stock-

bridge, Randall, Casey, Hutzler, Williams, Baker, Gary and Duffy (hereinafter called collectively the trustees) and the Librarian Wheeler for refusing to receive her application and admit her to a library training course conducted by the Library for prospective employees as Library Assistants on its staff solely because of her race or color. The course is conducted on public property with public facilities and at public expense. It is the only training course within the State of Maryland. Appellant's qualifications apart from race are not challenged. (Appdx. 109) She based her action on the equal protection clause of the 14th Amendment and the Federal Civil Rights Act, 8 U. S. Code, Secs. 41 and 43; and asked for damages against the individual trustees, an injunction and declaratory judgment. (Appdx. 1-8)

Plaintiff-Appellant, her father and a taxpayer of Baltimore City, joined in the action, seeking a declaratory judgment and an injunction against the Mayor and City Council of Baltimore, a corporation (hereinafter called the City) for a violation of the due process clause of the Fourteenth Admendment in appropriating to the Library certain large sums of City money raised by tax levy for support of the Library, if the Court determined the Library was a private corporation, not subject to constitutional restraints, in barring his daughter from the Library training course solely because of her race or color. (Appdx. 8-9)

Appellees all defended on the grounds Louise Kerr was not barred from the training course solely because of her race or color; that the library was a private corporation not subject to constitutional restraints; and that the appropriations of the City for Library purposes are legal. (Appdx. 10-22) After hearing on the merits the District Court dismissed the complaint, filing a written opinion which is found in 54 F. Supp. 514 and at pages 27-48 in the Appendix hereto.

QUESTIONS INVOLVED.

The questions involved arise on the findings of fact and conclusions of law of the District Court, which are clearly erroneous:

1. Did the Library refuse to receive the application of plaintiff Louise Kerr and deny her admission to the training class solely because of her race or color? The District Court held *No*; our contention is *Yes*.

2. Must the Library act within constitutional restraints in conducting its training class and making staff appointments not to discriminate against qualified persons solely because of race or color? The District Court held *No*; our contention is *Yes*.

3. Did the action of the Library in refusing to receive Louise Kerr's application and in denying her admission to the training class constitute State action within the scope of the 14th Amendment to the United States Constitution? The District Court held *No*; our contention is *Yes*.

4. Is the action of the City in making the voluntary appropriations to the Library, above the Pratt and Carnegie annuities, *ultra vires* if the Library is not within constitutional restraints in the conduct of its training class and making staff appointments? The District Court held *No*; our contention is *Yes*.

5. Are the individual Library trustees liable to plaintiff Louise Kerr under the Federal Civil Rights Act (8 U. S. Code, Secs. 41 and 43) for barring plaintiff from the training course solely because of her race or color? The District Court held *No*; our contention is *Yes*.

LEGISLATION INVOLVED.

The following constitutional and statutory provisions are involved:

1. *Federal*: United States Constitution, Amendment XIV, Section 1; the Civil Rights Act, 8 U. S. Code, Secs. 41 and 43; the Declaratory Judgments Act, 28 U. S. Code, Sec. 400.

2. *Maryland*: Declaration of Rights, Art. 43; and Constitution Art. 3, Sec. 48; Acts 1882, c. 181; 1908, c. 144; 1927, c. 328; 1939, c. 16.

3. *Baltimore City*: Ordinance 106, July 18, 1882; Ord. 64, May 14, 1883; Ord. 145, Oct. 10, 1884; Ord. 275, May 11, 1907; Ord. 249, Apr. 23, 1920; Ord. 1053, Apr. 13, 1927; Ord. 559, Dec. 7, 1928; Ord. 1195, Dec. 16, 1930; Ord. 961, May 29, 1939; and Baltimore City Charter, Sec. 6-14a.

The pertinent parts of the legislation are quoted in the Statement of Facts or set out in the Appendix.

STATEMENT OF FACTS.

History of the Library.

January 21, 1882, one Enoch Pratt in writing proposed to the City that he would erect a central library building on a lot owned by him, to cost about \$225,000.00, and deed the same to the City, with title to all the books and property also to be vested in the City, and further proposed to pay over to the City the sum of \$833,333.33 provided (1) the City would create a perpetual annuity of \$50,000.00 for support of a free public library consisting of a central library and four branches, and (2) the library be incorporated as the "Enoch Pratt Free Library of the City of Baltimore" with the first trustee board to be named by him from the "best citizens of Baltimore" and all vacancies on the board to be filled by the board who should have the management of the Library and to whom the City should pay the annuity in quarterly payments to be expended by the board in its own

discretion for library purposes. Mr. Pratt's letter further stated:¹

“The plan is suggested not without due consideration of the power of the City to carry it out. The City is expressly authorized by its charter to accept trusts for any general corporation purpose, or for the general purposes of education; and although its power of creating debts is limited by the Constitution of the State, yet *as the property of the Library is to belong to the city, and as it will receive a sum money to be disposed of as it pleases*, with the engagement only to pay an annual sum *for the support of its own Institution*, it is believed that such a transaction will not involve the creation of a debt within the meaning of the constitutional prohibition.” (Italics ours)

The Maryland legislature March 30, 1882 passed a special enabling Act (Acts 1882, c. 181) which after reciting in the preamble that “the plan thus proposed offers the means of perpetually promoting and diffusing knowledge and education among the people of the City of Baltimore”, empowered the City to accept the Pratt gifts and to agree by ordinance to pay to the trustees of the Library perpetually the annuity of \$50,000.00 (Secs. 1 and 5), and incorporated the Library, with nine persons theretofore named by Mr. Pratt as trustees with powers of self-perpetuation, to receive the annuity and expend the same for the purposes of said library in such manner as they think proper, and “to make all necessary by-laws and regulations for the government and administration of said trust, and for the appointment of the necessary officers and agents.” (Sec. 2). The Act further ordered the City to appoint a visitor to make an annual examination of and report on the affairs of the Library, and authorized the City to resort to the courts, if necessary, to compel the trustees properly to perform their trust. (Sec. 3)

Pursuant to the legislative authority above granted, the City passed its ordinance No. 106, July 15, 1882 “for the

¹ See Pratt letter in the Appendix.

purpose of perpetually promoting and diffusing knowledge and education among the people of the City of Baltimore", and agreed to accept the Pratt gifts and create a perpetual annuity of \$50,000.00 to be paid to the trustees "to be applied by them to the purposes and maintenance of said library as established and defined in the Act of Incorporation thereof".

By its Ordinance 64, May 14, 1883, the City directed the \$833,333.33 to be invested in Baltimore sinking fund, and the interest and interest on interest to be reinvested until the total annual interest should equal \$50,000.00, at which time no further investment should be made and all taxation for raising the annuity should cease. Pending this, the ordinance authorized the City to raise the annuity by taxation.

Mr. Pratt and wife conveyed the real estate to the City by deed July 2, 1883, which recited payment of the \$833,333.33 and set out the terms of agreement as to the annuity and management of the Library.

By Ordinance 145, October 10, 1884, the Mayor was authorized to appoint a visitor to the Library as provided in Acts 1882, c. 181.

In 1907 Andrew Carnegie gave the City \$500,000.00 for construction of branch libraries on sites to be provided by the City, on condition the City issue an annual tax levy not less than 10 per cent of the gift for maintenance of the branches. By Ordinance 275, May 11, 1907, the City accepted said gift and provided it should be expended by the Pratt Library trustees, and that upon completion of the branch library buildings the same should be maintained by an annual tax levy producing not less than 10 per cent of the Carnegie gift—the annual appropriation to be expended by the Pratt Library trustees for the branch libraries maintenance "*in such manner as may be specified from year to year in the Ordinance of Estimates*". (Italics ours.) The Ordinance was expressly made subject to approval by the State legislature.

By Acts 1908, c. 144 the Maryland Legislature impliedly ratified the gift by adding to the Baltimore City Charter, Art. 4, sec. 6, a provision empowering the city to "appropriate and pay over such sum or sums, as it shall from time to time deem proper, for the equipment, maintenance or support of the Enoch Pratt Free Library of Baltimore City, or of any other free public library in Baltimore City, or of the branches of the Enoch Pratt Library of Baltimore City, or of any other free public library in Baltimore City, *provided, that the title or ownership of the property of every such library or branch is vested in the said Mayor and City Council of Baltimore*". (Italics ours.) [City Charter, Art 4, sec. 6-14a.] Thereafter Ordinance 275, May 11, 1907 was reenacted as Ordinance 249, April 23, 1920.

The central library outgrew its quarters, and by Acts 1927, c. 328 the Maryland legislature authorized Baltimore City to issue its bonds in the amount of \$3,000,000.00 for acquisition of land by purchase or condemnation, erection and equipment of a free public library in the City of Baltimore. The City by Ordinance 1053, April 13, 1927 provided for said bond issue of \$3,000,000.00 and redemption of same in 35 yearly series, the first series amounting to \$36,000.00, for tax levy to meet the interest and principal due under the issue, for acquisition of a library site by purchase or condemnation for a free public library in Baltimore City, and further provided that the Pratt Library trustees should approve the site before it should be acquired, and further that the plans and specifications for the library building should be approved by the Pratt Library trustees and their acceptance endorsed on the plans before final acceptance by the City. The Pratt Library trustees did approve both site and building plans and specifications for the new library building. The site, building and equipment were paid for out of the bond issue. (Appdx. 55.)

By Ordinance 559, December 7, 1928 the City designated certain lots as the free public library site and directed the

City Solicitor to acquire said lots by purchase, or by condemnation proceedings in the name of the Mayor and City Council of Baltimore. Part of the ground had to be acquired by condemnation. (See *Johnson v. Mayor and City Council*, 158 Md. 93.)

By Ordinance 1195, December 16, 1930, the City incorporated the land acquired through the 1927 bond issue with the original lot which Mr. Pratt had conveyed to the City in 1883, provided for razing the buildings on the several parcels and erecting a suitable building for a free public library, and then provided in Section 3:

“That when said building is completed, the Enoch Pratt Free Library of Baltimore City shall be installed therein for the purpose of maintaining and conducting and operating a free public library for the purpose of promulgating, promoting and diffusing knowledge and education among the people of the City of Baltimore”.

After the building was completed and equipped the City turned over the same to the trustees, and since that time the trustees have operated it as the Enoch Pratt Free Library. (Appdx. 55.)

The Enoch Pratt Free Library of Baltimore City now includes the central building built out of the 1927 bond issue, and 26 branches. (Appdx. 55.)

Fiscal Relationship Between the Library and the City.

Down to about 10 years ago the City made blanket appropriations and turned over the same to the Library trustees to be expended for library purposes. Then with the large increases in city appropriations for library purposes, the City wanted better accounting, and made an arrangement with the trustees whereby all disbursements from city appropriations to the Library should be made through the City Bureau of Control and Accounts, on vouchers submitted by the trustees. (Appdx 120-122) The trustees make all staff appointments and all purchases for the Library, which are certified to the Bureau for payment.

(Appdx. 67-68, 115) Library staff salary checks are issued from the city payroll office, signed by the Mayor and City Council and payroll officer, and charged against the Library appropriation. (Appdx. 65) Library employees are not under the City Merit System, but the Library trustees make their staff salaries conform to the city salary scale (Appdx. 63, 113) and if the trustees want to make an increase above the city salary scale they have to take up the matter with the Board of Estimate. (Appdx. 113-114) Further in establishing new positions the trustees have to persuade the Board of Estimates to provide funds for same. (Appdx. 114, 123)

The trustees now submit an itemized budget to the City which is reviewed by the City Committee to review budget requests. This Committee, which consists of the Mayor and the head of the Bureau of Control and Accounts, reviews the proposed budget, eliminates or changes line items as it feels justified; then submits the revised budget to the Board of Estimates with recommendations. The Library budget is included in the regular city budget. (Appdx. 108, 122-123)

The Library turns all book fines collected over to the city treasury; and title to all books and other items purchased from special gift funds is placed in the City. The City owns all Library property and equipment and disburses all monies of the Library, except special gift funds which are disbursed by the trustees. The annual income from these special gifts recently has averaged about 6 or 8 thousand dollars, which is roughly about 1 per cent of the annual city Library appropriation. (Appdx. 56-66)

The \$50,000.00 Pratt annuity derived from interest on the city sinking fund is not included in the city appropriation. (Appdx. 63, 112) The interest and amortization of the \$3,000,000.00 bond issue are not charged against the Library appropriation, but are paid otherwise by the City. (Appdx. 61)

By Acts 1939, c. 16 the Maryland legislature authorized the City to include the Library employees within the city Municipal Employees Retirement System. By Ordinance 961, May 29, 1939, the City provided that if the Library trustees requested, the City would put the Library employees under the City Retirement System. The trustees so requested, and Library employees are now under the City Retirement System. (Appdx. 149) The contribution of the City for the Library employees to the Retirement Fund is about \$40,000.00 annually. This is not charged against the Library appropriation. (Appdx. 131)

The City appropriation, 1943, for the Library was \$511,575.00, excluding the Pratt annuity, interest and amortization on the bond issue, and contribution to the Retirement Fund. (Appdx. 62)

The City appropriation, 1944, for the Library was \$650,086.90, which in this instance includes the Pratt annuity of \$50,000.00. But bond interest \$82,160.00, bond retirement \$86,000.00, City contribution to Retirement Fund \$40,000.00 must be added. This makes the 1944 City contribution to the Library for Library purposes total \$858,246.90. (Appdx. 128, 131)

The Training Class.

The Library staff consists of 285 full-time employees (Appdx. 114) of whom about 140 or 150 are library assistants. (Appdx. 73) There are about 80 junior library assistants—the position to which training class graduates are appointed. (Appdx. 95)

There is a large turnover in staff each year; sometimes amounting to 20 per cent of the professional staff. (Appdx. 95) Due to the difficulties in finding replacements, the trustees in 1928 started a nine-months library training class for persons desiring employment on the Pratt Library staff as junior library assistants. The course does not lead to a degree, and is designed primarily to qualify persons for the Pratt Library system itself. (Appdx. 116) The

Library is not under obligation to employ the training class graduates but in fact *all competent persons who have graduated have been appointed to the staff as library assistants.* (Appdx. 72)

There has been a larger turnover in staff since the war. (Appdx. 73) For the past two or three years the training class has been too small and has not furnished sufficient replacements. (Appdx. 88) There are more vacancies than graduates. (Appdx. 81, 107) Due to the war emergency the 36-week training course has been telescoped into 26 weeks, and where student trainees had originally been paid \$40.00 a month after successfully completing the first three months training, the trustees April 19, 1943, voted to pay trainees \$50.00 per month after the first two weeks training, on the ground that otherwise a sufficient number of trainees could not be obtained. (Appdx. 73-74, 106)

The salaries of the training class director and department head, and the salaries of the student trainees are paid out of the general Library appropriations by regular pay checks from the city payroll office. (Appdx. 69, 74) The training class is conducted on public property with public facilities at public expense.

In the 16 years of the training class existence probably 200 or 300 Negroes have applied for admission (Appdx. 145) but Negroes are not admitted to the class. (Appdx. 76) To recruit the training class the Library circularizes the various white colleges in the eastern part of the United States and advertises in the Sun newspapers which have the largest circulation in Baltimore. (Appdx. 85-86)

Library Attitude Toward Employment and Training of Negroes as Library Assistants.

Down to 1942 the Library had never employed a Negro as a library assistant. By resolution June 14, 1933, the trustees voted not to employ Negro assistants anywhere in the library system. (Appdx. 94) On September 17, 1942,

the trustees formally voted not to admit Negroes to the training class:

“Resolved that it is unnecessary and unpracticable to admit colored persons to the Training Class of The Enoch Pratt Free Library. The Trustees being advised that there are colored persons now available with adequate training for library employment have given the librarian authority to employ such personnel where vacancies occur in a branch or branches with an established record of preponderant colored use.” (Appdx. 101-102)

Under that resolution two competitive examinations have been held among Negroes exclusively for appointment to two library assistantships at Branch No. 1 (Pitcher Street Branch) which has nearly 100 per cent Negro patronage. (Appdx. 103-105) These examinations were held in Baltimore but at least two applicants took the examination in Virginia and North Carolina. (Appdx. 83-85)

January 21, 1943, the trustees ordered the Librarian not to make any commitments to Negroes beyond the second library assistantship at Branch No. 1. (Appdx. 105) Of the 80 junior library assistantships on the Pratt Library staff, Negroes are eligible only for the two positions at Branch No. 1; whites are eligible for all 80 positions. (Appdx. 84, 105-6)

Plaintiff-Appellant Louise Kerr duly applied for admission to the 1943 training class, but was denied admission because there was no vacancy immediate or prospective which a Negro would be eligible to fill, and because her admission to the class “could result only in an unhappy and unprofitable waste of her time,” (Appdx. 164) and an unjustified expense to the Library. (Appdx. 174)

There is no segregation of patrons in the main library or in any branch library building. (Appdx. 100) Negro children constitute three-fourths of the readers in the Children’s Room in the main building but no Negro assistant is eligible for work in the main building. (Appdx. 167)

The trustees consider the other members of the staff in making appointments and feel most other staff members do not want to work with colored librarians. (Appdx. 179) Library assistants are determined as to race on the basis of what is the predominating color or race of the patrons going into a particular library or branch. This ruling is based on the customs of Baltimore. (Appdx. 173-174, 178, 181, 185)

The Library April 15, 1943 in written reply to a specific question "Will qualified colored persons be permitted to take the future library training courses?", categorically answered: "No". (Appdx. 110)

Findings and Ruling of the District Court.

The District Court found that the training course was conducted purely as a function of the internal management of the Library for instruction of prospective employees; that the refusal to admit Louise Kerr was not based solely on her race or color but in good faith because no position would have been open to her on graduation; that the policy and practice of the trustees in selecting only white persons for its technical staff* (with the exceptions of the two Negro library assistants at Branch No. 1) was not due to personal prejudice or discrimination by the trustees on account of race or color, but due to their best judgment in selection of employees in the interest of the public service to be rendered, and the fact that the largely predominant patronage of the main and branch libraries (with the one exception mentioned) is white. The Court held that the Library in selection and appointment of personnel, and its internal management was acting as a private corporation, was not subject to constitutional restraints, that the Library appropriations by the City were not *ultra vires*; and dismissed the complaint. (Appdx. 22-23)

* See colloquy of court and counsel (Appdx. 91-92).

SUMMARY OF ARGUMENT.

I. The Library corporation and the Library trustees refused to receive Louise Kerr's application and to admit her to the training class solely because of her race or color.

II. The Library and Library trustees in conducting the training class and making staff appointments are under constitutional restraints not to discriminate against qualified persons solely because of race or color.

A. The original act of incorporation created a corporation for the sole purpose of performing a delegated governmental function with public property and facilities, and public money.

1. The operation of public libraries is a governmental function in Maryland.

B. The Pratt Library and trustees in exercising the governmental function of administering a free public library are subject to constitutional restraints.

C. Neither State nor City can cede control over public property and public funds beyond constitutional restraints.

III. The action of the Library and trustees in refusing to receive her application and excluding Louise Kerr from the training course constitutes state action within the scope of the Fourteenth Amendment.

IV. The remedies sought are appropriate to the wrongs.

A. The trustees are individually liable in damages to Louise Kerr.

B. Injunctive and declaratory relief are proper.

C. T. Henderson Kerr, as a taxpayer, is entitled to injunctive relief against an illegal appropriation of City funds.

ARGUMENT.**I.**

The Library corporation and the Library trustees refused to receive Louise Kerr's application and to admit her to the training class solely because of her race or color.

The District Court found as a fact that the Library did not bar Louise Kerr from the training course solely because of her race or color; but barred her in good faith "because the Library had no available position to offer her if she had been enrolled and had successfully graduated from the course". This brings us to the old axiom that things equal to the same thing, are equal to each other.

The reason there would be "no available position" for Louise Kerr upon graduation from the training course is because the vacancies would be in positions restricted to and set apart by the Library and trustees for white library assistants, and Louise Kerr is not white but colored. (Appdx. 163-170)

There is no conflict in the testimony on this point. Every person from the Library organization who testified in the case (Dr. Wheeler, Dr. Cullen, Mr. Hutzler, Mr. Williams), repeated the same story: (1) that the race of the library assistant in a particular library or branch is determined by the race of the preponderant number of patrons using that library or branch; (2) that the Library and trustees will appoint Negro library assistants only where a branch has "an established record of preponderant colored use" (Resolution, September 17, 1942), (3) that the only place in the system where Negro library assistants are eligible for employment is at Branch No. 1 (two places) and that all other library assistantships are reserved for whites (78 out of 80 junior library assistantships); (4) that there is a surplus of trained Negroes available for the two assistantships at Branch No. 1; (5) that admission of Louise Kerr to the training class "could result only in an unhappy and unprofitable waster of her time" (Cullen letter to Hughes,

July 7, 1943). The trustees specifically rested their position on the customs of Baltimore. Mr. Hutzler said that although there are professional positions on the staff where the employee does not come in contact with the public, still she comes in contact with other staff members, and the trustees also consider staff relations in making appointments and that definitely a large percentage of the Pratt staff does not want to work with Negro librarians.

Whatever way it is stated, the reason for barring Louise Kerr reduces itself down to a question of race or color. Her personal qualifications are not challenged. Regardless how superior she is individually, her race or color disqualifies her. No Negro can qualify.

In the 16 years of the training course existence, some 200 or 300 Negroes have made application for admission to the training course; not a single one was ever admitted. Finally when the issue was put squarely to the Library: "Will qualified colored persons be permitted to take the future library training course?", the Library answered categorically *No*.

Just what more evidence the District Court would need to satisfy itself that the Library and Library trustees barred Louise Kerr from the training course solely because of her race or color is difficult to conceive. The Court surely would not have been misled by the trustees' tender solicitude about Miss Kerr wasting her time taking the course. The Court certainly does not expect the trustees to be naive enough to confess race discrimination. That just is not done.* But courts will always look behind the

* Officials always camouflage their race prejudice under the guise of other reasons. For example, in an attempt to perpetuate a racial differential in teachers' salaries, school officials frequently allege the white teachers have superior professional attainments and efficiency.

Mills v. Board of Ed., 30 F. Supp. 245, 248-259 (1939, Dist. Ct., D. Md., Chesnut, J.).

The University of Missouri curators in excluding a Negro boy from the University Law School said they were actuated by problems of student discipline.

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938; Record at pp. 176-177, 182-183).

Jury officials will never admit they bar Negroes from jury service because of race or color.

See *Norris v. Alabama*, 294 U. S. 587, 594 (1934).

reasons stated to determine whether *in truth and practical application* the discrimination is based on race or color

Yick Wo v. Hopkins, 118 U. S. 356 (1886).

Pierre v. Louisiana, 306 U. S. 354, 359 (1939).

Mills v. Lowndes, 26 F. Supp. 792, 800 (1939, Dist. Ct., D. Md. per Chesnut, J.).

It is submitted that the finding of fact that the Library did not bar Louis Kerr from the training course solely because of her race or color is clearly erroneous, is contrary to all the evidence in the case; and must be set aside and disregarded.

Rule 52, Federal Rules of Civil Procedure.

II.

The Library and Library trustees in conducting the training class and making staff appointments are under constitutional restraints not to discriminate against qualified persons solely because of race or color.

The District Court held that in conducting the training class and making staff appointments the Library was acting as a private corporation not subject to constitutional restraints against race discriminations, in spite of the fact that the training course is conducted on public property with public facilities at public expense, and that the staff is performing a public service through means of public property and public facilities, with staff salaries paid out of the city treasury. This raises substantial issues on the nature of the original incorporation, on limitations on the use of public property and public money in the public service, and on the right of citizens to qualify for the public service.

A.

THE ORIGINAL ACT OF INCORPORATION CREATED A CORPORATION FOR THE SOLE PURPOSE OF PERFORMING A DELEGATED GOVERNMENTAL FUNCTION WITH PUBLIC PROPERTY AND FACILITIES, AND PUBLIC MONEY.

The scheme of organization of the Pratt Free Library system can only be understood against its historical background. The 1880's was a period notorious for corruption of municipal governments. The spoils system and rotten politics placed every program of municipal improvement and public service in jeopardy.

Joeckel* "The Government of the American Public Library", c. I (U. Chicago Press. 1935).

Therefore it was but natural that Enoch Pratt in dedicating more than a million dollars of his hard earned money to a free public library for the citizens of Baltimore was concerned with keeping the Library from becoming a political football. He therefore proposed that the Library be incorporated, bearing his own name as his monument, with a self-perpetuating board of trustees (the first trustees to be named by him from "our best citizens") to administer the affairs of the Library. However, neither did Mr. Pratt completely trust the trustees, for he put title to the property and turned over the endowment money to the City as public property. In short, he split the ownership and management: public ownership eliminating any proprietary or vested interest in the trustees; private management eliminating the hazards of city politics in the administration of the library service.**

* Dr. Carleton Bruns Joeckel, Dean of the Graduate Library School, University of Chicago.

** The Enoch Pratt Free Library falls within the class which Joeckel calls "Public Libraries Controlled by Corporations and Associations". No less than 56, or more than one-sixth of all public libraries in American cities of more than 30,000 population, and a great many other smaller libraries fall in this category. They are largely confined to the east and south. For an extended treatment, see Joeckel, *loc cit*, c. III.

The Operation of Public Libraries is a Governmental Function in Maryland.

The advancement of education is a governmental function in Maryland.

Pearson v. Murray, 169 Md. 478, 182 A. 590, 103 A. L. R. 706 (1936).
Md. Declaration of Rights, Art. 43.

The scope of this governmental function covers more than the organized school systems, and by legislation specifically includes free public libraries.

Md. Anno. Code (Flack, 1939), Art. 77, c. 15.

“The Governor shall biennially appoint five persons, at least two of whom shall be women, who, with the State Librarian and the Librarian of the Enoch Pratt Free Library, shall constitute the Maryland Public Library Advisory Commission, which is charged with the extension and development of public library service throughout the State”. Art. 77, *supra*, Sec. 163.

The preamble both of Acts 1882, c. 181 incorporating the Pratt Free Library and of Ordinance 106, July 18, 1882 recite that the Pratt plan offers the means “of perpetually promoting and diffusing knowledge and education among the people of the City of Baltimore”. Acts. 1908, c. 144, amending the Baltimore City Charter (Art. 4, Sec. 6-14A) expressly authorized the City to make appropriations for the equipment, maintenance or support of the Enoch Pratt Free Library or of any other free public library in the City. Acts 1927, c. 328 authorized the City to make a \$3,000,000 bond issue “for the acquisition by purchase or condemnation of land and construction of a free public library in Baltimore City” (Sec. 2). Ordinance 1053, April 13, 1927 passed pursuant to the authority granted in Acts 1927, c. 328 *supra*, authorized the City to acquire a free public library site by purchase or condemnation. When a Baltimore property owner challenged the right of the City to

take his land by condemnation for a free public library site, the Maryland Court of Appeals in *Johnson v. City of Baltimore*, 158 Md. (1930) said:

“At the present time it is generally recognized and conceded by all thoughtful people that *such institutions form an integral part of a system of free public education* and are among its most efficient and valuable adjuncts. An enlightened and educated public has come to be regarded as the surest safeguard for the maintenance and advancement of the progress of civilized nations. More particularly is this true in republican forms of government, wherein all citizens have a voice. It is also true that education of the people ought not to and does not stop upon their leaving school, but must be kept abreast of the times by almost constant reading and study. It would therefore seem that *no more important duty or higher purpose is incumbent upon a state or municipality than to provide free public libraries for the benefit of its inhabitants.*” (at pp. 103-104; italics ours)

B.

THE PRATT LIBRARY AND TRUSTEES IN EXERCISING THE GOVERNMENTAL FUNCTION OF ADMINISTERING A FREE PUBLIC LIBRARY ARE SUBJECT TO CONSTITUTIONAL RESTRAINTS.

The State, or its subordinate municipality, may perform the governmental function of advancing education,

a) directly through its own agencies;
Md. Anno. Code, Art. 77, *supra*

b) indirectly, through grants—in-aid to established independent institutions,

Acts 1943, c. 710 (Appropriations Act): Heading “State-Aided Institutions”, items 88-96.

c) or by creating a corporation such as the Pratt Library corporation, for the particular purpose, to administer public property and public funds.

Acts 1882, c. 181 *supra*.

It has long been settled that a sovereign may create and use any instrumentality it may deem appropriate to carry out its governmental functions.

McCulloch v. Maryland, 4 Wheat. (17 U. S.) 316 (1819).

Clallam County v. United States, 263 U. S. 341 (1923).

The fact the state chooses to act through the corporate form rather than a traditional department is immaterial.

Cf. *Walker v. H. O. L. C.*, 25 F. Supp. 589 (1938).

The legislature has the full power to determine the sovereign powers and immunities of its instrumentalities, and the intent of the legislature is determinative.

Helvering v. Gerhardt, 304 U. S. 405 (1938).

Pittman v. H. O. L. C., 308 U. S. 21 (1939).

It may be conceded that the Pratt Library would be held to be a *private* corporation under Maryland decisions.

University v. Maas, 173 Md. 554, 197 A 123 (1938).

But private persons and associations exercising governmental functions are subject to constitutional restraints.

Nixon v. Condon, 286 U. S. 73 (1932).

Smith v. Allwright, 321 U. S. 649 (1944).

Steele v. L. & N. R. Co., 323 U. S. — (December 18, 1944).

As noted above, the Pratt Library was created for the purpose of exercising governmental functions, and for no other purpose:

A. It owns no property of any kind (books purchased through private gifts are turned over to the City).

B. It administers public property and public funds in performance of a public service.

C. It has the power of subordinate legislation affecting the use of public property and public funds.

D. It enjoys sovereign exemption from all state and local taxation.

E. Its actual fiscal operations employ for all purposes the fiscal machinery of Baltimore City.

F. Its maintenance is 100 per cent from public funds. (Income from private gifts are used for special collection purchases.)

G. It performs the governmental function of advancing education.

The authority of the Library and trustees over public property and public funds stems directly from the state under the legislative acts hereinbefore mentioned.

“The pith of the matter is simply this, that when these agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of purely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly.”

Nixon v. Condon, supra, at p. 88.

The test whether an instrumentality is subject to constitutional restraints is functional and does not depend on organization structure.

Steele v. L. & N. R. Co., supra.

“The test is not whether the members of the Executive Committee are the representatives of the state in

the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action”.

Nixon v. Condon, supra, at p. 89.

The District Court in its opinion relies heavily on *University v. Williams*, 9 Gill & J., 365, 22 Md. 232 (1838) and *Clark v. Maryland Institute*, 87 Md. 643 (1898) to establish that grants to the Pratt Library by the City do not transform the Library into a *public* corporation. These cases and the corporations they involve are readily distinguishable from the instant case and the Pratt Library Corporation.

In 1838 the University of Maryland was a private charitable corporation holding title to its own property and its own funds. Likewise, the Maryland Institute owned its own property and its own funds. The University of Maryland case states it does not appear any endowments by the State had been made to the University (9 G. & J. at p. 398). In the Maryland Institute case the city appropriated \$9,000.00 for the limited and restricted purpose of affording certain scholarships, pursuant to an 1893 ordinance empowering the City to contract with the Institute for instruction of a number of pupils in its Schools of Art and Design for the next eight years.

Finan v. Cumberland, 154 Md. 563 (1928), cited by the District Court is no authority which affects Louise Kerr's position. There a taxpayer questioned the authority of the City of Cumberland to advance \$100,000.00 out of the proceeds of a public bond issue (Acts 1927, c. 411) to the Alleghany Hospital of Sisters of Charity, a private eleemosynary corporation, for purpose of erecting buildings and improvements. Again the private corporation held title to its own property and funds; and the gift was purely supplementary.

In the present case the public appropriation is not merely supplementary. The public property and public funds are the very substance of the corporation existence: there are no other means of its operation. Dr. Wheeler, the Librarian, testified the corporation could not operate without the voluntary public appropriations. Even the original donor, Mr. Pratt, conceived of and characterized the Library as the City's *own institution*, referring to the fact title to the building and funds was to be vested in the City (Letter, January 21, 1882, *supra*).

C.

NEITHER STATE NOR CITY CAN CEDE CONTROL OVER PUBLIC PROPERTY AND PUBLIC FUNDS BEYOND CONSTITUTIONAL RESTRAINTS.

When Enoch Pratt deeded the Library building and equipment and paid over the endowment of \$833,333.33 to the City for a governmental purpose, title vested in the City in its sovereign governmental capacity. It held such property henceforth subject to the constitutional restraints which govern its own existence as a government.

We are not dealing here with segregation or separate facilities, but with exclusion. There is only one Library training class in existence. No substantially equal separate training class for Negroes exists.

It needs no citation to establish that the City could not use public property or expend public funds to the profit and advantage of the white population to the exclusion or disadvantage of the Negro.

See:

Pearson v. Murray, supra.

Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938).

Alston v. School Board, 112 F. (2d) 992, 130 A. L. R. 1506 (1940).

Appointment to public office cannot be made more onerous for Negroes than for whites.

Alston v. School Board, supra.
People v. Crane, 214 N. Y. 154, 167-168, 108 N. E. 427
 (1915).

Neither can the City or State by delegation of legislative power accomplish indirectly what it cannot accomplish directly.

Nixon v. Condon, supra.
Carter v. Carter Coal Co., 298 U. S. 238 (1936).

Maryland recognizes that a delegation of governmental power must be hedged about with safeguards against arbitrary action.

Baltimore v. Radecke & Co., 49 Md. 217 (1878).

In this case is true that nowhere in the state acts or city ordinances are the constitutional restraints spelled out in black letter text; but this is not necessary. The Federal Constitution is the supreme law of the land, and as such as much a part of every statute and ordinance as if expressly repeated therein. Under the principle that a statute or ordinance will not be construed as unconstitutional unless unavoidable, the constitutional restraints are implied.

Steele v. L. & N. R. Co., supra.

III.

The action of the Library and trustees in refusing to receive her application and excluding Louise Kerr from the training course constitutes state action within the scope of the Fourteenth Amendment.

By resolution of the trustees, September 17, 1942, a policy was established discriminating against Negroes solely because of race or color as to the use of public property, public facilities and public funds. This discrimination has the force of law because the state (*Acts 1882, c. 181 supra*)

gave the board of trustees rule making power. A similar resolution by the Board of Regents of Maryland University was held to be State action in *Pearson v. Murray, supra*; so also as to a resolution of the Board of Regents of the University of Missouri in *Missouri ex rel. Gaines v. Canada, supra*.

“Misuse of power, possessed by virtue of State law and made possible only because the wrongdoer is clothed with the authority of State law, is action taken ‘under color of State law’ ”.

United States v. Classic, 313 U. S. 299, 326 (1941).

See also:

Nixon v. Condon, supra.

Cf. *Carter v. Carter Coal Co., supra*.

Steele v. L. & N. R. Co., supra.

The action of the Library trustees and Library pursuant to the policy established by this resolution in refusing to receive Louise Kerr’s application and admit her to the training class falls directly within the precedents of the *Murray* and *Gaines* cases above.

The District Court in holding that the action of the trustees is not state action relies heavily on *Snowden v. Hughes*, 321 U. S. 1 (1944). There plaintiff, a candidate for state political office, sued the three men who made up the Illinois State Primary Canvassing Board for false certification of primary returns and nomination under the Federal Civil Rights Act. Counsel for plaintiff expressly disclaimed any discrimination on the ground of class or race (321 U. S. at p. 7). He asserted the action of the Board was in violation of the State statute. The United States Supreme Court held:

“The unlawful administration by state officers of a state statute, fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it *an element of intentional or purposeful discrimination*. This may appear on the face of the

action taken with respect to a particular class or person, Cf. *McFarland v. American Sugar Co.*, 241 U. S. 79, 86-7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo v. Hopkins*, 118 U. S. 356, 373-4'' (loc. cit. at p. 8) (Italics ours.)

In the present case an intentional or purposeful discrimination, in spite of the professed excuses, appears on the face of the action of the Library and trustees, in that Louise Kerr was barred not for any personal deficiency but solely because of her identity as a Negro.

See:

Smith v. Allwright, supra.

In view of the fact that specific precedents in the Court of Appeals of Maryland and the United States Supreme Court establish that action parallel to the action of the Pratt Library and Pratt trustees is state action, it would seem unnecessary to belabor the point further. But to clinch the argument, a brief review of the successive extension of powers and functions given the Library trustees by the State and City will show how intimately the trustees have been assimilated into the government structure and how complete has been the delegation to them of governmental powers and functions over the free public library service to the people of Baltimore.

1882: Act of incorporation for purpose of administering public property and public money for library purposes, with power to make by-laws and regulations governing same.

(Acts 1882, c. 181; Ord. 106, July 18, 1882).

1907: trustees to accept the sites on which the Carnegie branch library buildings to be built; Carnegie gift to be expended by the trustees; annual appropriation for branches built out of Carnegie gift to be expended by the trustees.

(Ord. 275, May 11, 1907).

1908: City given express legislative authority to appropriate money to Enoch Pratt Free Library of Baltimore City, by name.

(Acts 1908, c. 144).

1927: trustees to approve library site acquired out of bond issue, before final approval; trustees to approve plans and specifications for the new library building to be erected out of the bond issue, and to endorse acceptance on the plans, before final acceptance of same by the City.

(Ord. 1053, Apr. 13, 1927).

1930: Enoch Pratt Free Library to be installed in new library building "for the purpose of maintaining and conducting and operating a free public library for the purpose of promulgating, promoting and diffusing knowledge and education among the people of the City of Baltimore."

(Ord. 1195, December 16, 1930).

1934: (?)* City fiscal machinery put at service of trustees in auditing and making all disbursements under city appropriations.

[Testimony of Fallon, head of City Bureau of Control and Accounts (Appdx. 120-122.)]

1939: Library employees placed under municipal employees Retirement System, with City making contribution to Retirement Fund for the Library employees.

(Acts. 1939, c. 16; Ord. 961, May 29, 1939.)

1944: Total City appropriation, plus Pratt annuity, for Library purposes under control of trustees \$858,246.90**.

* Date uncertain. Spoken of as about ten years ago in the testimony.

** Joeckel says (loc. cit. p. 101) that maintenance charges of the library buildings is borne by the city and not charged against the Library budget, as the buildings are city property. If this is so, the city appropriation for 1944 substantially exceeded the \$858,246.90 mentioned.

This then is not *Snowden v. Hughes* where the Primary Canvassing Board was acting in violation of the state statute. Here the trustees are acting under color of and pursuant to authority delegated them by a state statute. Their resolution of September 17, 1942 is *legislation* itself, having the force of law by authority delegated them by the Maryland legislature. (Acts. 1882, c. 181.) *Pro tanto*, as far as Louise Kerr and all Negroes are concerned they are, in their corporate capacity, the *state*. If they are then to be beyond constitutional restraints, it is not because they are acting in their private capacity, but because they are a *super-state* completely beyond political control.*

IV.

The remedies sought are appropriate to the wrongs.

A.

THE TRUSTEES ARE INDIVIDUALLY LIABLE IN DAMAGES TO LOUISE KERR.

The individual trustees individually and collectively approved all the discriminatory acts complained of.

* The trustees are a static group, changes in the board occurring only upon death or resignation (Appdx. 162). Joeckel (loc cit. pp. 93, 106-7) describes these corporate library boards as follows:

"It is clear that these boards are largely made up of one class of people; they do not remotely approach a cross-section of their communities. Somewhat as in a club, every effort is made to select a 'congenial and appropriate type of person' for membership, with the result that boards are still composed of the sort of 'intelligent and cultivated' people Dr. Rice wanted a half-century ago. Economically, the members usually represent the higher levels, although some of them are in modest circumstances. With few exceptions they live in the better residential sections of their cities, and geographical representation of different parts of the city is difficult to achieve, even if it is desired. The nationality of the members is largely American and English. (93)....

"Nowhere among American libraries are feelings and opinions so firmly entrenched, points of view so solidified, and traditions so established as in this group of corporate institutions. They are indeed the aristocrats of the library scene, even though the word 'aristocrat' be used in its benevolent sense (106).... the very virtues of the system may become its vices. Continuity and stability may degenerate into stagnation and complacency. A system in which length of tenure in board membership is such an outstanding feature is admittedly susceptible to this possibility. Escape from the real or imagined dangers of politics may easily lead only to ultra-conservative and undemocratic management" (107).

Express authority for holding the individual trustees liable to Louise Kerr in damages under the Federal Civil Rights Act (8 U. S. C. Secs. 41 and 43) for excluding her from the training course solely because of her race or color is found in *BLUFORD v. CANADA*, 32 F. Supp. 707 (1940), where the Registrar of the University of Missouri was held answerable to Lucile Bluford in damages for excluding her from the University of Missouri School of Journalism.*

Cf. *Lane v. Wilson*, 307 U. S. 268 (1939).

The District Court ruled that "in the selection and appointment of its employees, and its internal management" the Library acts "as a private corporation and not as a governmental agency" (Appdx. 23). This is strange doctrine. Until the decision in this case the books had always held "internal affairs" of a corporation to refer to rights, claims and duties between a corporation and its members or between member and member, as distinguished from rights, claims and duties between the corporation and outsiders.

"Where a corporate act complained of affects the complainant only in his relation as a shareholder or officer of the corporation, and *no public right is involved*, then the controversy must be said to relate to the 'internal affairs' of the company . . ."

Westminster Nat. Bank v. New England Electrical Works, 73 N. H. 465, 62 A 971, 975, 3 L. R. A. (ns) 551, 111 Am. St. Rep 637 (1906; italics ours).

Louise Kerr is not a member of the Enoch Pratt Free Library corporation; her rights are affected as a citizen. In fact the Pratt Library corporation has no membership base; it has no human beings except nine trustees.

* The opinion of the Court was filed in ruling on the Registrar's motion to dismiss. The complaint was amended and the case was thereafter tried to a jury which returned a verdict against Miss Bluford. Miss Bluford appealed, but did not press the appeal which was thereafter *pro forma* dismissed. (119 F. 2d 779 (1941).)

If the corporation were hiring people out of its own corporate treasury to deal with its own property, conceivably the matter of hiring might relate to the internal affairs of the corporation. Here hiring is out of the Baltimore City *public* treasury, and the jobs consist of handling *public* property in the performance of a *public* service. And no person on the payroll or in training class is a *member* of the corporation, they all come from outside.

There is not a single internal action which the corporation or its trustees can take which does not instantly affect public rights either in the use of public property or expenditure of public funds, except possibly the filling of a vacancy on the board of trustees itself.

The trustees draw no stipend, hence the public treasury is not immediately and directly involved. The trustees perform no active function, hence the use of public property is not immediately and directly involved because they can hold their meetings off Library property. But every contract whether for acquisition of supplies or personnel, is a matter of public concern, since public property and public funds are involved. The ruling of the District Court on this point must seek its support in sources other than logic and precedent.

8 U. S. Code, sec. 43 imposes individual liability on "every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or territory subjects any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." In the present case the state statutes and city ordinances under which the trustees acted have been cited. Their resolution of September 17, 1942 amounts to a state regulation in view of the legislative power conferred on the trustees by the state in the act of incorporation (Acts 1882, c. 181). The trustees themselves explicitly justify their action on the basis of the customs of Baltimore. The grounds of liability are multiple.

B.

INJUNCTIVE AND DECLARATORY RELIEF ARE PROPER.

It is elementary law that an injunction will lie to restrain future repetition of past wrongs, and the Library has categorically stated that qualified Negroes will not be admitted to the training course in the future.

See:

Bitterman v. L. & N. R. Co., 207 U. S. 205 (1907).

The injunction sought does not demand Miss Kerr's admission to the class; merely that her application be received and acted on in regular course without discrimination.

The interpretation and construction of the provisions of statutes and ordinances are appropriate subjects of declaratory relief.

Borchard, *Declaratory Judgments*, 2d ed.; pp. 788-789.

In addition plaintiff Louise Kerr expressly charges and the Library admits that in the period between rejection of her application and the opening of any library training class there would not be time to have her rights to enter that class adjudicated in court. (Appdx. 107-8) Under such circumstances injunctive relief and declaratory relief are the only practicable remedies.

C.

T. HENDERSON KERR, AS A TAXPAYER, IS ENTITLED TO INJUNCTIVE RELIEF AGAINST AN ILLEGAL APPROPRIATION OF CITY FUNDS.

T. Henderson Kerr joined his daughter in asking for a declaratory judgment as to her rights and the Library and trustees' duties. If the court should rule the Library and trustees are beyond constitutional restraint in making staff appointments and conducting the training class, he seeks

an injunction against an illegal appropriation of City funds.

It is true that the state legislature authorized the City to make appropriations to the Pratt Library (Acts 1908, c. 144), but that authorization means appropriations within constitutional limits. It is unconstitutional to delegate either legislative or executive authority without proper safeguards against arbitrary and oppressive action.

Baltimore v. Radecke & Co. supra.
Carter v. Carter Coal Co., supra.

If therefore the City has no control over the Library appropriations once made (Appdx 115, 124) and if the trustees can spend the same in their own discretion so long as they keep within the indefinite and elastic scope of library purposes (Appdx 127), then we maintain that the appropriations are bad because there are no safeguarding standards against discriminatory and oppressive action.

Carter v. Carter Coal Co., supra.

The Library corporation as a super-state is not entitled to raid the City treasury, and the City must be just before it is generous.

If our position be sound, as a matter of substantive law then Maryland precedents establish that an injunction will issue to prevent an illegal appropriation of city money.

St. Mary's Industrial School v. Brown, 45 Md. 310 (1876).*

As pointed out by the District Court, T. Henderson Kerr does not sue to enjoin the collection of a tax, but merely to enjoin the illegal appropriation of tax money once collected and in the City treasury.

* Subsequent legislative action has destroyed the practical effect of the *St. Mary's Industrial School* case as a matter of substantial law, but as a precedent establishing procedure it is still sound.

SUMMARY.

Logic and principle lost a battle in the District Court to prejudice and conservatism. It is submitted that the decision of the District Court misconstrues the character of the powers delegated to the Library corporation and Library trustees under the state statutes and city ordinances, and that the decision must be reversed and the cause remanded with instructions that the Library corporation and Library trustees be placed under constitutional restraints in the selection of staff personnel, conduct of the training class, and all other acts performed by them under their delegated governmental function of "perpetually promoting and diffusing knowledge and education among the people of the City of Baltimore" through the operation of a free public library on public property with public facilities and wholly at public expense.

Respectfully,

W. A. C. HUGHES

CHARLES H. HOUSTON.